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# Supreme Court

of the

# United States

NO.....

ORIGINAL, OCTOBER TERM, 1941

EX PARTE THE STATE OF TEXAS ET AL.,

Petitioners.

**Return of the Respondents James P. Alexander, Chief Justice of the Supreme Court of Texas, and John H. Sharp and Richard Critz, Associate Justices of the Supreme Court of Texas, to the Rule to Show Cause Issued Herein and Served Upon Them**

CAPITAL PRINTING CO., INC.

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

The respondents James P. Alexander, Chief Justice of the Supreme Court of Texas, and John H. Sharp and Richard Critz, Associate Justices of the Supreme Court of Texas, for their return to the Rule issued

herein requiring them to show cause why leave to file the Petition for Mandamus should not be granted, respectfully show:

I.

Whether this Court has jurisdiction to entertain this proceeding is a question determinable by this Court alone. The petitioners present no argument or comment on this question.

II.

Respondents admit that the exhibits, attached to the Petition for the Writ of Mandamus tendered herein for filing, correctly set forth the proceedings had in the Supreme Court of Texas in the case of the Lone Star Gas Company, Plaintiff in Error, v. The State of Texas et al., Defendants in Error, said exhibits including a copy of the application for writ of error filed by the Lone Star Gas Company (Exhibit F, Petition, p. 254); the order of the Supreme Court of Texas granting said application (Exhibit G, Petition, p. 492); the opinion of the Supreme Court of Texas (Exhibit H, Petition, p. 493); the judgment of the Supreme Court of Texas (Exhibit I, p. 545; the motion for rehearing filed by the defendants in error State of Texas, et al (Exhibit J, Petition, p. 547); motion for rehearing filed by the plaintiff in error Lone Star Gas Company (Exhibit K, Petition, p. 575); and the judgment of the Supreme Court of Texas overruling said motion for rehearing (Exhibit L, Petition, p. 585).

They also admit that Exhibits A, B, C, D and E attached to said Petition for Mandamus correctly set

forth the proceedings had in the Court of Civil Appeals in the same cause (Petition, pp. 53-253).

III.

In the petition and supporting brief, the petitioners undertake to interpret that part of the opinion of the State Supreme Court setting forth fully its construction of the opinion of this Court in Lone Star Gas Company, Appellant, v. State of Texas, et al., Appellees, No. 313, October Term, 1937. While not accepting as correct all of the statements made by the petitioners in that connection, respondents deem it to be unnecessary to comment on these statements in detail. The opinion of the State Supreme Court shows the construction placed by it on the opinion of this Court.

IV.

In the Petition for Mandamus, as well as in the supporting brief, it is stated, in effect, that the reversal by the Supreme Court of Texas of the judgment of the Court of Civil Appeals was based solely upon the State Supreme Court's construction of the opinion of this Court, it being also claimed that this Court's opinion was erroneously construed by the State Supreme Court (Petition, pp. 8, 12, 21). On this point petitioners in their supporting brief say:

> "The Supreme Court of Texas reversed the judgment of the Court of Civil Appeals upon the sole ground that it was required to do so by the judgment of this Court, which it construed to preclude any consideration of the evidence by the Court of Civil Appeals." (Petition, p. 20).

The opinion of the State Supreme Court shows that its reversal of the judgment of the Court of Civil Appeals was based upon two grounds: one involving its construction of the opinion of the Supreme Court of the United States (Petition, pp. 509-515) and the other involving its construction and application of a State statute (Article 6059, Texas Revised Civil Statutes of 1925), defining the scope of judicial review of rate orders of the Railroad Commission (Petition, pp. 515-534).

In its opinion the State Supreme Court sets forth the construction placed upon this State statute, Article 6059, by the Court of Civil Appeals, as follows:

> "2. That Article 6059, supra, does not contemplate a de novo fact trial in the district court in gas rate order cases even where the issue of confiscation is tendered and tried. In this connection, we construe the opinion of the Court of Civil Appeals to hold that in actions tried under Article 6059, supra, to set aside a gas rate order as confiscatory, or unreasonable and unjust, the findings of the Railroad Commission are final and conclusive on issues of fact if the evidence is conflicting on such issues." (Petition, p. 505).

On the same point the State Supreme Court also quotes the following from the opinion of the Court of Civil Appeals:

> "Such opinion further says:
>
> " 'The instant case is a concrete illustration of the fact that it is neither possible nor desirable for the courts to extend review of legislative or administrative determination beyond requiring

that it shall be based upon substantial evidence.'" (Petition, p. 507).

The defendants in error in the case of Lone Star Gas Company v. State of Texas, et al (petitioners here) admitted that the evidence on the issue of confiscation was conflicting. The following is quoted from their motion for rehearing filed in the State Supreme Court, wherein they set forth the rulings made by this Court, as follows:

> "(1) There was conflicting evidence before the District Court upon the issue of confiscation. (Petition, p. 549).
>
> "We agree that 'in the opinion of the United States Supreme Court this record does present conflicting evidence on the issue of confiscation.'" (Petition, p. 548).

In these circumstances the State Supreme Court was required to determine what construction of Article 6059 should be accepted; that of the Court of Civil Appeals under which the Commission's rate orders were required to be upheld if sustained by substantial evidence, or that which affirms the power of the court trying the case to make independent findings of fact, settling the conflicts in the evidence—the conflicts having been settled in the particular case by a jury verdict.

In setting forth its construction of Article 6059 and in disapproving the construction adopted by the Court of Civil Appeals, the State Supreme Court said:

> "We now come to consider the kind and character of trial contemplated and provided by Article 6059, supra, in cases brought thereunder to con-

test gas rate orders promulgated by the Railroad Commission, on the ground of confiscation, or on the ground of unreasonableness and unjustness. We deem it expedient to here quote the statute: (Here the statute referred to is quoted. Petition, pp. 515-516).

"* * * * *

"From the above authorities we conclude that a de novo judicial trial means a full civil trial on the facts as well as the law. It follows that in refusing the writ of error from the first opinion of the Court of Civil Appeals we held that a de novo trial under Article 6059 means a full civil trial on the facts as well as the law, and not merely a trial to correct nonpermissible errors. As to what is meant by a de novo trial we also cite the cases of **Shultz & Bro. v. Lempert,** 55 Tex. 273, and **Ex parte Morales,** 53 S. W. 107." (Petition, p. 519).

The State Supreme Court then quoted Article 6453, Revised Statutes of 1925, enacted as a part of the Act of 1891, creating the Texas Railroad Commission and providing for judicial review of its orders, and reviewed at length the decisions of the State courts arising under the railroad rate statute and holding that a de novo trial was contemplated. With respect to the smiliarity of the two statutes, the Court said:

"The above satute, so far as pertinent here, is in the same language as Article 6059, supra, under which this case was tried. The only difference between Article 6059 and Article 4565, R. C. S. 1895, and subsequent codifications, so far as this case is concerned, is that one statute refers to railroad rates and the other to gas rates. It is therefore evident that the two statutes confer upon the dis-

rict court exactly the same jurisdiction to try and determine fact questions in contested rate cases. If the Supreme Court had determined and decided the kind of trial provided by the railroad statute, supra, at the time Art. 6059, supra, was enacted, it must be presumed that in enacting such subsequent statute in the same language as the railroad statute, the two should be given the same construction.

" * * * *

"At the time Article 6059, supra, was enacted the Supreme Court has already construed Article 4565, supra, and its subsequent codification as providing for a de novo trial in cases where rate orders of the Railroad Commission were under attack. **Railroad Commission v. H. & T. C. Ry. Co.**, 90 Tex. 340, 38 S. W. 750; **Railroad Commission v. Weld & Neville**, 96 Tex. 394, 73 S. W. 529; **G. C. & S. F. R. Co. v. Railroad Commission**, 102 Tex. 338, 113 S. W. 741." (Petition, p. 520).

Among the cases reviewed by the State Supreme Court was the case of **G. C. & S. F. Ry. Co. v. Railroad Commission**, 102 Tex. 338. Discussing that case, the State Supreme Court said:

"The case of **G. C. & S. F. Ry. Co. v. Commission**, supra, settles beyond debate that the Supreme Court had construed the railway review statute as contemplating a de novo fact trial in the district court.

" * * * *

"It will be noted that the opinion says: 'The question presented to us is, if the facts alleged in the applicant's petition shall be established by

"clear and satisfactory evidence", would a jury be authorized to find a verdict that such rates, charges, etc., were unreasonable and unjust to the appellant?' By its discussion following this quotation, and the discussion preceding the same, the court answers that there could be a jury question. This is clear, because the first question certified to the Supreme Court by the Court of Civil Appeals was whether the trial court erred in sustaining the Railroad Commission's general demurrer to the railroad company's petition. The Supreme Court held that the question certified by the Court of Civil Appeals really presented the question as to whether or not evidence could raise an issue to submit to the jury. The court then answered, in effect, that a jury question could be presented under the statute. If the statute only contemplates a law trial, and further contemplates that the fact findings of the Commission shall be final on conflicting evidence, it would be impossible to have a jury trial thereunder. This is evident because only a law trial could be had whether the evidence be conflicting or all one way.

"We think we have fully demonstrated that the railroad statutes of like import as Article 6059, supra, had been uniformly construed by this Court as contemplating a de novo fact trial in the district court in rate order cases at the time the Legislature enacted Article 6059, supra. We therefore think it must be presumed beyond a doubt that the Legislature intended Article 6059, in the same language, to award the same character of judicial trial or review as the railroad statutes." (Petition, pp. 524, 526-527).

The State Supreme Court then summarized its rulings as follows:

> "The great length to which we have extended this opinion moves us to abstain from discussing further authorities.
>
> "From our discussion of the United States Supreme Court opinion in this case it is evident that we hold that that court did consider and pass upon the sufficiency, in law, of the evidence contained in this record to raise an issue of fact on the question of confiscation involved in this appeal. It is also evident that we hold that such opinion decides that the evidence contained in this record is sufficient, in law, to invoke the fact finding jurisdiction of the district court. It follows that such matter has been foreclosed by the United States Supreme Court, and is not open for decision by this Court, and was not open for decision by the Court of Civil Appeals.
>
> "It is also evident that we hold that Article 6059 of our Revised Civil Statutes clothes our district court with fact finding jurisdiction in cases attacking gas rate orders of the Commission as being either unreasonable and unjust, or as being confiscatory." (Petition, pp. 529-530).

After quoting a part of the charge given in the district court and criticized by the Court of Civil Appeals, the State Supreme Court said:

> "We are unable to agree with the holding of the Court of Civil Appeals that the above charge was erroneous for two reasons, (a) because we think the opinion of the United States Supreme Court

decides otherwise, and (b) because the decision is based on an erroneous assumption.

" * * * * *

"As to our holding (b), supra, we interpret the opinion of the Court of Civil Appeals to hold that the portion of the trial court's charge above quoted is erroneous because the findings of the Commission on the question of what properly was 'used and useful' is final where determined by that agency on substantial evidence. Of course, our decision that the trial is de novo under Article 6059 in cases like this contesting rate orders of the Commission overrules this holding of the Court of Civil Appeals.

"Our holding with reference to the charge of 'used and useful' also disposes of the rulings of the Court of Civil Appeals with reference to the book costs of the Gas Company's undeveloped gas leaseholds. Our holdings, supra, also dispose of the rulings of the Court of Civil Appeals with reference to the Gas Company's developed and productive leaseholds." (Petition, pp. 537-538).

The foregoing quotations from the opinion of the State Supreme Court are sufficient to disclose the two grounds upon which it based its reversal of the judgment of the Court of Civil Appeals and to show that its action was based, in part, upon its construction and application of the State statute auhorizing judicial review of rate orders of the Railroad Comission and permitting the trial court to make independent findings of fact in such a case, settling the conflicts in the evidence, instead of being required to uphold the Commission's order if sustained by substantial evidence. These quotations are enough to show that the State Supreme

Court would have rendered the same judgment if it had based the same solely upon its construction of the State statute and not at all upon its construction of the opinion of his Court.

V.

In the petition, as well as in the supporting brief, statements are made to the effect that the State Supreme Court, by reason of an alleged misconstruction of the opinion of this Court, has in effect denied the power of the Court of Civil Appeals over the facts of this case. The Court of Civil Appeals in this State has full power to set aside findings based on conflicting evidence and believed by it to be against the overwhelming weight and preponderance of the evidence and to remand the case for another trial; but it is without power to set aside findings based on conflicting evidence and then make its own findings and render judgment thereon. **Post v. State,** 106 Tex. 500, cited in the opinion of this Court (304 U. S. 231).

In this case, the Court of Civil Appeals has held, as pointed out by petitioners, that the validity of the Commission's order (1) "conclusively established as a matter of law" (this ruling being based upon the Court's construction of Article 6059 that was disapproved by the State Supreme Court), and (2) "factually from so overwhelming a weight and preponderance of the evidence as to require a reversal in the interest of justice." (Petition, p. 9). Then, instead of remanding the case upon the second finding, it rendered final judgment on the first. If the Court of Civil Appeals had remanded the case for another trial, because the findings of the district court were against the

great weight and preponderance of the evidence, the State Supreme Court would have had no jurisdiction to review it. It was the rendering of final judgment that gave the State Supreme Court jurisdiction to review the ruling that the evidence was insufficient in law to raise the issue of confiscation and insufficient in law to support the findings made in the district court; this ruling being based upon what the State Supreme Court held to be an untenable construction of the applicable State statute, Article 6059.

Respectfully submitted,

JAMES P. ALEXANDER,
Chief Justice, Supreme Court of Texas

JOHN H. SHARP,
Associate Justice, Supreme Court of Texas

RICHARD CRITZ,
Associate Justice, Supreme Court of Texas